Supreme Court, U.S.
FILED
OCT 9 2002
CLERK

No. 01-10925

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS JONES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**(CAPITAL CASE)**

# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

Whether, in this capital case, trial counsel provided petitioner with ineffective assistance because (1) he conceded during opening argument at the guilt phase of the trial that petitioner was responsible for committing the charged offenses, and (2) he requested and received an instruction at the penalty phase that misstated the sentencing options available to the jury.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 287 F.3d 325. The opinion of the court of appeals on direct appeal is reported at 132 F.3d 232. The opinion of this Court affirming the judgment on direct appeal is reported at 527 U.S. 373.

## JURISDICTION

The judgment of the court of appeals was entered on March 27, 2002. The petition for a writ of certiorari was filed on June 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of kidnapping with death resulting to the victim, in violation of 18 U.S.C. 1202(a)(2). He was sentenced to death. The United States Court of Appeals for the Fifth Circuit affirmed. 132 F.3d 232. This Court granted petitioner a writ of certiorari and affirmed the judgment of the court of appeals. 527 U.S. 373. Thereafter, petitioner filed a motion to vacate his conviction and sentence under 28 U.S.C. 2255. The district court denied the motion and declined to issue a certificate of appealability. Pet. App. B1-B10. Petitioner then applied to the court of appeals for a certificate of appealability under 28 U.S.C. 2253(c)(1)(B), and the court of appeals denied the application. Pet. App. A1-A19.

1. Petitioner kidnapped Private Tracie McBride at gunpoint from the Goodfellow Air Force Base in San Angelo, Texas. Army Prvt. Michael Peacock witnessed the kidnapping and tried to prevent it, but petitioner struck him on the head with a handgun and left him bloodied and unconscious. 527 U.S. at 376; Pet. App. A2; 16 R. 883-884, 900-902, 904-908; 23 R. 2310.[1]

Petitioner then brought McBride to his house where he sexually assaulted her. 527 U.S. at 376; Pet. App. A2. After the sexual assault, petitioner forced McBride into his bedroom closet, where he tied her up with white nylon rope and used two socks to

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[1] Citations to "R." refer to the record in the criminal trial.

gag her. 16 R. 957; 23 R. 2319-2320. While McBride was in the closet, petitioner was visited by a friend, Margaret Rodriguez, towards whom he made sexual advances. 17 R. 1010-1014.

After Rodriguez left, petitioner decided to kill McBride because she had heard Rodriguez mention his name. 16 R. 957. After forming that plan, petitioner washed McBride's clothes and made her clean herself to remove evidence of the rape. 21 R. 2030-2031; 23 R. 2325. Petitioner then made McBride walk out of the house on towels that he had placed on the floor, because he believed that, if she did so, no fibers from his residence would be on her clothes or boots. 23 R. 2328.

Petitioner forced McBride into his car and drove to a bridge in a remote location 20 miles outside of San Angelo. 527 U.S. at 376; Pet. App. A2; 132 F.3d at 237. Petitioner struck McBride on the head several times while she was still in the car. 16 R. 957-958. McBride apparently had not yet lost consciousness, and petitioner led her under the bridge. 16 R. 958. There, petitioner struck her again until she fell, and he continued to strike her several more times after she was down, shattering her skull and killing her. Ibid. Petitioner administered blows of such force that, when McBride's body was found, the medical examiners observed that large pieces of her skull had been driven into her cranial cavity or were missing. 527 U.S. at 376; Pet. App. A2.

While in state custody for the abduction and sexual assault of Sgt. Sandra Lane, his ex-wife, and after receiving his Miranda warnings, petitioner gave oral and written statements in which he

admitted to the abduction and murder of McBride. Thereafter, petitioner led law enforcement officers to McBride's body, which he had left under the bridge where he murdered her. 132 F.3d at 237.

2. a. In preparation for trial, defense counsel conducted "an intensive search to locate mental health and medical experts to examine and evaluate [petitioner] for the purpose of discovering and presenting possible mitigating evidence." Pet. App. B3. Counsel also sought unsuccessfully to suppress the statements that petitioner made admitting his guilt of the murder as well as incriminating evidence seized by the police. Ibid.

b. At trial, defense counsel remarked during his opening statement that "I want to say to you at the very outset that [petitioner] does not dispute that he is responsible for the death of Tracie McBride. You will hear no excuses about insanity or self-defense. You will hear no evidence of justification." See Pet. App. A4. The remainder of counsel's opening statement made it clear that the defense strategy was to admit those facts that it could not plausibly contest (e.g., that petitioner had confessed to the abduction and murder, and that his ex-wife had identified him as a possible suspect after he had kidnapped and sexually assaulted her as well); force the government to prove each element of its case; and rely on the presentation of mitigating evidence. Id. at A4 & nn. 1-2. Counsel consistently introduced mitigating evidence throughout both the guilt and penalty phases of the trial. Id. at B4. Counsel had informed petitioner of his proposed concession, and petitioner had concurred in counsel's strategy. Id. at A5.

c. After the jury found petitioner guilty, a special jury sentencing hearing was held in accordance with the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq. Under the FDPA, before the jury may sentence a defendant to death, the jury must find the existence of at least one of the "intent" factors enumerated in 18 U.S.C. 3591(a)(2), to ensure that the defendant acted with the degree of culpability sufficient to justify the death penalty. In addition, the jury must find the existence of at least one aggravating factor enumerated in 18 U.S.C. 3592(c). If the jury finds that those requirements are satisfied, then it may consider any non-statutory aggravating factors for which notice has been given, and it may weigh all aggravating factors it has found against any mitigating factors that any individual juror finds to exist. See 18 U.S.C. 3593(c) and (d). The jury may impose the death penalty if it concludes that all the aggravating factors found to exist sufficiently outweigh all the mitigating factors found to exist to justify a sentence of death, or, in the absence of any mitigating factor, that the aggravating factors are alone sufficient to justify a death sentence. See 18 U.S.C. 3593(e).

Pursuant to defense counsel's request, the district court instructed the jury at the sentencing hearing that, based on its weighing of the aggravating factors found to exist and any mitigating factors found to exist, it must "by unanimous vote, * * * recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release,

or sentenced to some other lesser sentence." 132 F.3d at 244. The court further instructed the jury as follows:

> If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide.

Ibid.

Regarding the intent element, the jury found that petitioner intentionally killed McBride and intentionally inflicted serious bodily injury that resulted in her death. 132 F.3d at 238. The jury then found two statutory aggravating factors: that petitioner caused McBride's death during his commission of the crime of kidnapping, and that he killed her in an especially heinous, cruel and depraved manner. Ibid. The jury also found two non-statutory aggravating factors: McBride's young age, slight stature, background, and unfamiliarity with San Angelo; and her personal characteristics and the effect of her death on her family. Ibid. After weighing the aggravating factors against the ten mitigating factors found by one or more jurors, the jury returned a unanimous sentence of death. 132 F.3d at 238-239.

3. On direct appeal, petitioner contended, among other things, that the district court should have given his proposed jury instruction that a failure to reach a unanimous verdict recommending the death penalty would automatically result in a

sentence of life without the possibility of release, and that the court erroneously instructed the jury that it could sentence petitioner to a prison term of less than life without possibility of release. See 132 F.3d at 243-248.

The court of appeals held that petitioner's proposed instruction about the implication of the jury's failure to reach a unanimous verdict was incorrect, because life without the possibility of release is not the "default penalty" in the event of deadlock. 132 F.3d at 243. Rather, in the court's view, the failure to reach a unanimous verdict would result in a "hung jury with no verdict rendered." Ibid. The court further explained that federal courts have never been "affirmatively required" to give such an instruction. Id. at 245. The court concluded that "no constitutional violation occurs when a district court refuses to inform the jury of the consequences of failing to reach a unanimous verdict." Ibid. The court rejected petitioner's contention that "the instructions given by the district court could lead a reasonable jury to believe that the failure to reach a unanimous decision would result in the imposition of a lesser sentence." Id. at 246. In so doing, the court rejected, as precluded by the rationale of Federal Rule of Evidence 606(b) and federal case law, petitioner's proffer of juror affidavits purporting to show that jurors in fact were confused by the instructions. 132 F.3d at 245-246.

The court of appeals also rejected petitioner's claim that the district court committed plain error in allowing the jury three

sentencing options - death, life imprisonment without release, or some other lesser sentence. 132 F.3d at 246-248. After examining the "disparate sentencing options" described in the FDPA, 18 U.S.C. 3593(e), which provides for all three possibilities, and the kidnapping statute, 18 U.S.C. 1201, which provides only for death or life without release, the court concluded that the kidnapping statute "took precedence over the death penalty sentencing provisions." 132 F.3d at 248. Accordingly, the court agreed with petitioner that, if the jury had recommended "some lesser sentence," the court would have been obligated to impose life without possibility of release as the only authorized sentence of imprisonment. Ibid. Nevertheless, the court declined to find that the erroneous "lesser sentence" instruction constituted plain error because no "clearly established law" resolved the issue, so the error was not "obvious, clear, readily apparent or conspicuous." Ibid.

4. Petitioner filed a petition for certiorari, which this Court granted. 525 U.S. 809. One of the issues before the Court was whether the jury was led to believe that, if it could not reach a unanimous sentence recommendation, the district court would impose a sentence less severe than life imprisonment without release, so that petitioner's proposed instruction on the consequences of deadlock was necessary to correct the jury's impression. 527 U.S. at 384. The Court reversed the holding of the court of appeals that any jury deadlock on whether to recommend a sentence of death or life without the possibility of release

would necessitate the impaneling of a second jury; rather, the Court agreed with petitioner that, if the jury could not reach a unanimous sentencing verdict, then the district court was required to impose a sentence of life without the possibility of release. 527 U.S. at 380-381; id. at 417-418 (Ginsburg, J., dissenting).

Nevertheless, the Court rejected petitioner's argument that the jury was led to believe that the court would impose a lesser sentence in the event of deadlock. 527 U.S. at 387-394. The Court applied the plain error standard, because petitioner had failed to object to the instruction on the jury's sentencing options or to the verdict forms corresponding to those instructions, id. at 387-389, but the Court concluded that no "error occurred" (id. at 390). The Court explained that the district court did not expressly inform the jury that it would impose a lesser sentence; rather, it stated that, if the jury recommended a lesser sentence, the court would impose a sentence "authorized by law." Id. at 390. The Court also pointed out that the instructions did not require the jury to select the "lesser sentence" option if it could not reach agreement; instead, the instructions exhorted the jury to reach agreement. Id. at 390-391. The Court concluded that the instructions as a whole, which repeatedly required that any sentencing recommendation be unanimous, did "not create a reasonable likelihood that the jury believed that deadlock would cause the District Court to impose a lesser sentence." Id. at 392.

The Court further held that any error in the instruction did not affect petitioner's substantial rights in light of (1) the district court's admonition to the jury not to concern itself with the effect of a "lesser sentence" recommendation (527 U.S. at 394), and (2) the fact that it was "just as likely that the jurors, loath to recommend a lesser sentence, would have compromised on a sentence of life imprisonment as on a death sentence," so that any jury confusion about the effect of deadlock would not necessarily have worked to petitioner's disadvantage (ibid.).

The Court noted that petitioner urged the Court to consider two affidavits prepared after the jury had returned its sentencing recommendation. 527 U.S. at 394 n.11. The Court explained that the Fifth Circuit had ruled that petitioner could not rely on the affidavits to undermine the jury's sentencing recommendation. Ibid. (citing 132 F.3d at 245-246). Because petitioner did not raise that independent determination in any of his questions presented, and the issue was not fairly included within any of the questions presented, the Court "decline[d] review of this ruling by the Fifth Circuit." Ibid.

5. Petitioner subsequently filed a motion asking the district court to vacate his conviction and sentence under 28 U.S.C. 2255 on the ground that defense counsel provided him with ineffective representation at both the guilt and penalty phases of his trial. Specifically, petitioner argued that trial counsel was unconstitutionally deficient in conceding petitioner's responsibility for McBride's death during his opening statement at

the guilt phase and in requesting the erroneous instruction at the penalty phase that allowed the jury to recommend a lesser sentence than life without possibility of release.

The district court rejected both claims. Pet. App. B1-B10. The court concluded that counsel made a "reasoned strategic choice to concede [petitioner's] guilt * * * in order to gain credibility with the jury to argue that the mitigating evidence justified a sentence of life imprisonment rather than the death penalty." Pet. App. B6-B7. The court also found that, given the "indisputable" evidence of guilt, there was no reasonable likelihood that the result of the trial would have been different if counsel had elected to deny petitioner's culpability. Id. at B7.

Likewise, the district court concluded that counsel made an "informed strategic decision" to request that the jury be instructed as to all three sentencing options prescribed by Section 3593(e)." Pet. App. B7. The court explained that, at the time of the trial, the law was unsettled on whether a lesser sentence was in fact an option available to the jury. Id. at B5. The court also found that the inclusicn of the "lesser sentence" option in the instructions did not prejudice petitioner. Id. at B7. The court denied petitioner's request for a certificate of appealability. See id. at A2.

6. Petitioner then sought a certificate of appealability on the same grounds from the court of appeals. Pet. App. A1. The court rejected the request. Id. at A1-A19. The court held, first, that defense counsel's concession in the opening statement did not

constitute ineffective assistance. In so doing, the court observed that an admission of "responsibility" for a death is not tantamount to an admission of every element of the charged offense, and that counsel told the jury that he would require the prosecution to prove each element of the capital murder charge. Id. at A7. The court concluded that the concession "may have been the best [tactic] available and [that] the record amply reflects that [petitioner] consented to its use." Id. at A8.

With respect to petitioner's objection to counsel's requested instruction on the available sentencing options, the court of appeals observed that "because § 3593(e) refers to the possibility of a 'lesser sentence,' even if the only actual available sentences are the death penalty and life imprisonment without possibility of release, it is difficult to infer that counsel's inclusion of or failure to object to that language * * * was ineffective assistance." Pet. App. A9. The court also concluded that, even if counsel committed error, "[p]etitioner suffered no prejudice as the result of it." Id. at A10. Referring to its earlier holding on direct appeal, the court stated that there was "no danger that the jury would believe that a non-unanimous deadlock between death and life without release could result in a 'lesser sentence.'" Ibid. The court also reiterated its earlier holding that jury deadlock would have resulted in the impaneling of a second jury, which the court apparently mistakenly believed had been affirmed by this Court. Ibid. The court further reasoned that there was no danger that the jury might have chosen the death penalty out of concern

that petitioner might one day be returned to the streets because the jury knew "that they, and they alone, had the power to impose * * * life without the possibility of release" as an alternative to death. Id. at A11.

ARGUMENT

1. Petitioner contends (Pet. 15-19) that the court of appeals erred in refusing him a certificate of appealability on his claim that his trial counsel provided constitutionally ineffective assistance by conceding in his opening statement that petitioner was responsible for McBride's death. To merit a certificate, petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Under Strickland v. Washington, 466 U.S. 668 (1984), to establish ineffectiveness of counsel, petitioner must show that counsel's representation fell below an objective standard of reasonableness (id. at 687-688) and that there is a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different (id. at 694). The courts below correctly concluded that petitioner failed to make a "substantial showing" that counsel's concession constituted ineffectiveness under the Strickland test.

This Court has recognized that "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. A defendant seeking to establish ineffectiveness of counsel must overcome the "strong presumption" that the challenged actions "might be considered sound trial strategy." Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Representation is not unconstitutionally deficient merely because, with the benefit of hindsight, a court may disagree with counsel's informed choices. See Strickland, 466 U.S. at 689. To the contrary, the "strategic choices [of counsel] made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690.

As both the district court and the court of appeals concluded, the concession by petitioner's counsel was an "informed strategic decision[]" and a "permissible trial tactic" to which petitioner gave his "informed and knowing consent" and which "may have been the best available." Pet. App. A7-A8; see id. at B3-B6. Defense counsel, "experienced trial attorneys" (id. at B3), were faced with "overwhelming evidence of [petitioner's]" guilt (id. at B4), including petitioner's oral and written confessions, his knowledge of the remote location of McBride's body, and Peacock's testimony identifying petitioner as the man he had seen with McBride immediately after her abduction. Counsel sought to suppress petitioner's confessions and much of the incriminating evidence, but the evidence was found admissible. Id. at B3. Nor did counsel have available any tenable defense of insanity, self-defense or justification. Indeed, petitioner does not suggest any plausible defense theory that counsel could have pursued at the guilt phase.

Given the indisputable evidence of guilt, if counsel had denied petitioner's responsibility for the charged crimes, he would have risked forfeiting any credibility in the eyes of the jury at the penalty phase. That loss of credibility would have undermined

counsel's ability to present the significant evidence in mitigation that they had amassed. Instead, counsel made a reasonable strategic decision, with petitioner's informed consent, to forgo an unrealistic attempt to deny petitioner's culpability, in the hope of enhancing the credibility of the defense case in mitigation and possibly saving petitioner's life. See Pet. App. A7-A8, B3-B4, B6-B7. At the same time, counsel conducted "an intensive search to locate" mitigating evidence (id. at B3) and "consistently introduced mitigating evidence throughout both the guilt-innocence and the punishment phases of the trial" (id. at B4). The reasonableness of the defense strategy is supported by the fact that one or more jurors found ten of the 11 mitigating factors submitted by the defense, relating to such matters as petitioner's criminal record, his military service, his abuse as a child, his remorse, the impact of his execution on his daughter, and his mental and psychological state at the time of the offenses. See 527 U.S. at 411 n.12 (Ginsburg, J., dissenting). Thus, counsel "did not abdicate their role as advocates for [petitioner]" but made "an informed strategic decision." Pet. App. B3-B4. Cf. Carter v. Johnson, 131 F.3d 452, 466 (5th Cir. 1997) ("counsel may make strategic decisions to acknowledge the defendant's culpability and may even concede that the jury would be justified in imposing the death penalty in order to establish credibility with the jury"), cert. denied, 523 U.S. 1099 (1998).

Petitioner also was not prejudiced by counsel's concession. As the district court concluded, petitioner "fails to explain * *

* how different actions on the part of his defense counsel would have made a difference in his conviction." Pet. App. B4. "Given the indisputable evidence of [petitioner's] guilt, there is no reasonable likelihood that the jury would have reached a different decision if his trial counsel had elected to deny [petitioner's] culpability as to the kidnapping and murder charges in the guilt-innocence phase of the trial." Id. at B7. Therefore, petitioner cannot show the prejudice required by Strickland. See Basden v. Lee, 290 F.3d 602, 616 (4th Cir. 2002).

The cases on which petitioner relies (Pet. 16) do not help him. In Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert. denied, 470 U.S. 1059 (1985), the defendant was convicted of murder and rape and sentenced to death. Although the defendant took the stand and denied any knowledge of the crime, his counsel stated in closing argument that the defendant was guilty, and, instead of urging acquittal on the ground of insanity, suggested that his client deserved life imprisonment because he was feebleminded and under the influence of alcohol and drugs at the time of the crime. Id. at 1193 & n. 7. Counsel's purpose in taking this tack was to "win sympathy" from the jury and "to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury." Id. at 1194. The court of appeals held that the concession rendered counsel's representation ineffective under the Sixth Amendment. Id. at 1194-1195.

This case is significantly different from Spraggins. First, far from taking the stand and denying guilt, petitioner agreed to

counsel's strategic decision to concede his responsibility for the crime at the outset of the trial. There is no indication in Spraggins that the defendant agreed to counsel's concession; to the contrary, the court characterized the concession as an improper expression of counsel's "personal opinion." 720 F.2d at 1194. In a subsequent capital case, LoBosco v. Thomas, 928 F.2d 1054, 1056-1057 (11th Cir. 1991), the Eleventh Circuit, distinguishing Spraggins, held that a similar concession by defense counsel did not constitute ineffective assistance because the defendant consented to the strategy. See also Felker v. Thomas, 52 F.3d 907, 911 (11th Cir. 1995), cert. denied, 516 U.S. 1133 (1996).

Second, while the Spraggins court stated that the evidence against the defendant was "strong" (720 F.2d at 1194), there is no discussion in the opinion of the nature of that evidence, so it is unclear whether there was any room for counsel to make a plausible argument in his client's defense. Here, as the district court expressly found (Pet. App. B7), the evidence of petitioner's guilt, including his confessions, was so overwhelming that a successful defense at the guilt phase was virtually impossible. See Magill v. Dugger, 824 F.2d 879, 888 (11th Cir. 1987) (distinguishing Spraggins on ground that the defendant there did not confess to the crime).

Finally, Spraggins predated Strickland, and the court applied a relaxed standard of prejudice requiring only that counsel's deficiency "caused 'actual and substantial disadvantage' to the conduct of [the defense]." 720 F.2d at 1194, 1195 (quoting Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982)

(en banc), rev'd, Strickland v. Washington, 466 U.S. 668 (1983)). It is by no means obvious that the court would have reached the same result under Strickland, especially in light of Strickland's more demanding standard of prejudice.[2]

Nor is petitioner helped by United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991). There, defense counsel conceded in his closing argument that there was no reasonable doubt that his client had committed the charged bank robbery. The case was not capital, so there was no question of conceding responsibility for the crime in order to encourage the jury to exercise mercy in determining the punishment. The court of appeals held that counsel's concession of guilt deprived the defendant of his right to effective assistance, stating that it constituted "an abandonment [by counsel] of the defense of his client." Id. at 1074. In so doing, the court stressed that there was no claim that counsel had acted in furtherance of any identifiable trial strategy. Id. at 1075-1076. In this case, in contrast, counsel's concession was a reasonable tactical maneuver, undertaken with petitioner's approval, that in no way constituted an "abandonment" of his client.

2. Petitioner also contends (Pet. 5-15) that he was entitled to a certificate of appealability on his claim that counsel was

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[2] Petitioner's case is also quite different from Young v. Zant, 677 F.2d 792 (11th Cir. 1982). In that case, which also predated Strickland, the court of appeals rested its determination that counsel provided constitutionally ineffective assistance on a variety of errors, including counsel's decision to present an insanity defense when there was no evidence to support it and counsel's failure to recognize that the government's case was "extremely thin" on a critical element of the offense. Id. at 798.

unconstitutionally ineffective at the punishment phase of the trial because of counsel's request for the "lesser sentence" instruction. Petitioner is correct that the only sentences available for the crime of kidnapping with death resulting are death and life imprisonment without release. See Jones, 527 U.S. at 414-415 (Ginsburg, J., dissenting).[3] Accordingly, defense counsel's requested instruction on the sentencing options available to the jury was incorrect insofar as it suggested that the jury could recommend a lesser sentence. But there is no merit to petitioner's claim that the request for the erroneous instruction amounted to ineffective assistance of counsel.

To begin with, defense counsel's request for the erroneous instruction was not objectively unreasonable. The FDPA, 18 U.S.C. 3593(a), states that the jury must unanimously recommend "whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence." This Court has held that, where the jury is invested with the responsibility of imposing sentence, it must be presented with all the authorized sentencing options. See Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). As the court of appeals observed on direct appeal, at the time petitioner was sentenced, "no clearly established law answered the question of whether § 3593 or the substantive criminal statute under which the defendant is convicted provides the correct sentencing options." 132 F.3d at 248. See

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[3] The government conceded this point in Jones I (see 527 U.S. at 387 n.8) and in the court below (see Opposition to Application for Certificate of Appealability 19).

also Pet. App. B5. In those circumstances, counsel's request for the "lesser sentence" instruction (from which petitioner could possibly have derived a strategic advantage) was not outside the range of reasonably competent assistance. See id. at B7 (finding that "[d]efense counsel made an informed strategic decision to request that the jury be instructed on all of the sentencing options set forth in 18 U.S.C. § 3593(e)").

In any event, as both the district court and court of appeals concluded, petitioner was not prejudiced by the instruction. See Pet. App. A10, B7. In support of his claim of prejudice, petitioner relies in part (Pet. 7-8) on Simmons v. South Carolina, 512 U.S. 154 (2002), and its progeny. Under Simmons, where future dangerousness in society is at issue and life without parole is the only authorized alternative to the death penalty, the jury must be told of the defendant's parole ineligibility. Id. at 161-162. See also Kelly v. South Carolina, 534 U.S. 246 (2002); Shafer v. South Carolina, 532 U.S. 36 (2001). In adopting that rule, the Court was concerned that the jury in Simmons might falsely have believed that Simmons could be released on parole if he were not executed. 512 U.S. at 161. As the court of appeals explained (Pet. App. A11), that concern is not implicated in this case, because the jury knew that it had the power to sentence petitioner to life without possibility of release as an alternative to death. The "lesser sentence" instruction did not deprive the jury of that power. Accordingly, unlike in Simmons, the jury here could not have

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